IN THE

Supreme Court of the United States

No. 136

THE TEXAS AND PACIFIC RAILWAY COMPANY, *et al.*,

Petitioners,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, *et al.*,

Respondents.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

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IN THE

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OCTOBER TERM, 1947.

No. 136

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vs.

BROTHERHOOD OF RAILROAD TRAINMEN, *et al.*,

Respondents.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

Petitioners earnestly request the Court to review and grant their petition for a writ of certiorari because:

I.

The Court Should Clarify the Uncertain State of the Law Produced by Its Former Decisions.

This is a suit for a declaratory judgment. A union bargaining agent under the Railway Labor Act demanded that petitioners negotiate changes in a working agreement, or suffer a penalty for their failure so to do. Employees who would be injuriously affected threatened petitioners with damage suits if such changes were made, alleging that the officers of the union were proceeding in violation of its constitution and by-laws. This violation was found

to be a fact by the District Court, which entered a declaratory judgment [R. 340]. The Circuit Court ordered a dismissal of the cause for lack of a justiciable controversy [R. 356; 159 F. 2d 826].

Mr. Justice Frankfurter, joined by Chief Justice Stone, Mr. Justice Roberts and Mr. Justice Jackson, thus stated one of the principles of law at issue in this case:

> "The carrier is under a legal duty to treat with the union's representative for the purposes of the Railway Labor Act. Section 2, Ninth; see *Virginian R. Co.* v. *System Federation*, 300 U. S. 515. We do not have the ordinary case where a third person dealing with an ostensible agent must at his peril ascertain the agent's authority. In such a situation a person may protect himself by refusing to deal. Here petitioner has a duty to deal. If petitioner refuses to deal with the officials of the employees' union by challenging their authority, it does so under pain of penalty," *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 755.

The same principle was announced by the Circuit Court in this case when it declared:

> "The carriers are under a statutory duty to negotiate with the Brotherhood",

and that Court then stated the second principle at issue in this case when it added:

> "Neither negotiation nor an agreement with them therefore can make the carriers liable" [R. 359; 159 F. 2d 827].

These pronouncements, however sound, unfortunately furnish no guide to litigants because (1) the declarations of Mr. Justice Frankfurter, and his colleagues, appear in a dissenting opinion, and (2) the statements of the law by the Circuit Court are *obiter dicta*, coming after a decision that the cause should be dismissed [R. 356; 159 F. 2d 826].

The third principle at issue is the justiciability of the controversy.

Petitioners instituted this action for declaratory judgment against the bargaining agent and against the employees who claimed they would be injured because:

1. Courts will protect a union member's seniority rights, arising out of the union's collective bargaining contract and its constituiton, "against action by the union which is arbitrary, fraudulent, illegal, or in excess of the union's powers or those of the officers or tribunals through which it acts," and Courts will protect a union member's seniority rights, secured by rules and contract of the Brotherhood, "against prejudicial change by a tribunal of the brotherhood acting in excess of powers conferred upon it by the brotherhood's constitution," *142 A. L. R. 1067,* Limitations on General Rule;

2. Petitioners had learned of the unhappy experience of the Louisville & Nashville Railroad Company in the *Steele case,* notwithstanding the declaration of the Supreme Court of Alabama that the Railway Labor Act "places a mandatory duty on the Railroad to treat with the Brotherhood as the exclusive representative of the employees in a craft" and "imposes heavy criminal penalties for willful failure to comply with its command," *Steele* v. *Louisville & N. R. Co., et al.,* 323 U. S. 197; and

3. The decisions of this Court do not clearly define, but leave uncertain, the respective obligations, duties, rights and other legal relations of petitioners, their employees and the bargaining agent, under circumstances where, as here, employees who would be adversely affected have put petitioners on notice that the officers of the union are proceeding in violation of its constitution and by-laws.

Petitioners respectfully submit that the latter statement is warranted by the following quotations from decisions of this Court:

Virginian Ry. v. *Federation,* 300 U. S. 515:

"It [the Railway Labor Act] at least requires the employer to meet and confer with the authorized rep-

resentative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First" (page 548).

Steele v. *L. & N. R. Co.*, 323 U. S. 192.

In reversing the Supreme Court of Alabama, this Court said:

"It construed the statute, not as creating the relationship of principal and agent between the employees of the craft and the Brotherhood", etc. (page 198).

Elgin, J. & E. R. Co. v. *Burley*, 325 U. S. 711.

"They (respondent employees) relied upon provisions of the Brotherhood's constitution and rules, of which the carrier was alleged to have knowledge, as forbidding union officials to release individual claims or to submit them to the Board 'without specific authority so to do granted by the individual members themselves'; and denied that such authority in either respect had been given" (page 718).

"The collective agent's power to act in the various stages of the statutory procedures is part of those procedures and necessarily is related to them in function, scope and purpose" (page 728).

In light of these decisions, we respectfully suggest that each member of the Court ask himself whether or not he could safely advise a railroad client to negotiate or not to negotiate an agreement with a union bargaining agent when employees, who would be adversely affected thereby, have put the railroad on notice that the officers of the union are proceeding in violation of its constitution and bylaws and that such employees will sue the railroad in damages if such agreement is made.

In this case the Court can, and petitioners pray that it will, declare the law in plain and unequivocal language so that petitioners, their employees, and the bargaining agent, who must live under the Railway Labor Act, may at least know what it means.

II.

The Controversy Is Actual and Justiciable Within the Meaning of the Declaratory Judgment Act.

The controversy is actual and justiciable whether tested by the decisions of this Court or by the legislative history of the Declaratory Judgment Act which petitioners have sought, so far without success, to have applied in this case.

The determining factors have been thus stated by this Court:

Maryland Casualty Co. v. *Pacific Co.*, 312 U. S. 270.

> "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment" (page 273).

Aetna Life Ins. Co. v. *Haworth*, 300 U. S. 227.

> "The Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy,' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense. The word 'actual' is one of emphasis rather than of definition. * * *" (pages 239-240).
>
> * * * * *
>
> "A 'controversy' in this sense must be one that is appropriate for judicial determination. *Osborn* v. *United States Bank*, 9 Wheat. 738, 819. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 116. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. *South Spring*

> *Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300, 301; *Fairchild* v. *Hughes*, 258 U. S. 126, 129; *Massachusetts* v. *Mellon*, 262 U. S. 447, 487, 488. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. * * * Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised * * *" (pages 240-241).

The instant case meets every test set forth in the quoted decisions. Furthermore, if this Court should write into a *judgment* the *obiter dicta* of the Circuit Court, viz.:

> "The carriers are under a statutory duty to negotiate with the Brotherhood. Neither negotiation nor an agreement with them therefore can make the carriers liable [R. 359; 159 F. 2d 827],

that judgment will terminate this litigation.

This controversy also will be found actual and justiciable when tested by the legislative history of the Declaratory Judgment Act. That history is set forth in House Report No. 1264 and in Senate Report No. 1005, 73d Congress, 2nd Session, and in extracts from "Declaratory Judgments", by Edwin Borchard, Co-draftsman of that Act*. Copies of those documents, marked Exhibits A, B, and C, respectively, are attached hereto. The following quotations are indicative of the contents of those exhibits:

HOUSE REPORT No. 1264.

> "The 'declaratory judgment' is a useful procedure in determining jural rights, obligations, and privileges, but may be applied to the ascertainment of almost *any determinative fact or law.* * * * It is intended to

* Congressional Record, page 2027, 70th Congress, 1st Session.

save tedious and costly litigation by ascertaining at the outset the controlling fact or law involved, thus either concluding the litigation or thereafter confining it within more precise limitations" (Exhibit A, page 3).

"The principle involved in this form of procedure is to confer upon the courts the power to exercise in some instances preventive relief; a function now performed rather clumsily by our equitable proceedings and inadequately by the law courts.

"A most simple and striking definition of the procedure is thus made by Professor Borchard, of the Yale University School of Law. He writes:

> 'The declaratory judgment, it will be recalled, enables parties who are uncertain of their legal rights, and are pecuniarily or otherwise prejudiced by actual or potential adverse claims by others, to invoke the aid of the courts for the determination of their rights before any injury has been done'" (Exhibit A, pages 2-3).

SENATE REPORT No. 1005.

"An important practical advantage of the declaratory judgment lies in the fact that it enables litigants to narrow the issue, speed the decision, and settle the controversy before an accumulation of differences and hostility has engendered a wide and general conflict, involving numerous collateral issues" (Exhibit B, page 5).

"The procedure has been especially useful in avoiding the necessity, now so often present, of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages" (Exhibit B, page 4).

"There seems little question that in many situations in the conduct of business serious disputes occur between parties, where, if there were a possibility of obtaining a judicial declaration of rights in a formal action, much economic waste could be avoided and so-

cial peace promoted. Persons now often have to act at their peril, a danger which could be frequently avoided by the ability to sue for a declaratory judgment as to their rights or duties" (Exhibit B, pages 4-5).

"Finally, it may be said that the declaratory-judgment procedure has been molded and settled by thousands of precedents, so that the administration of the law has been definitely clarified. The Supreme Court mentioned one of its principal purposes in *Terrace* v. *Thompson* (263 U. S. 197, 216, 44 Sup. Ct. 15, 1923), by Butler, J., when it said:

> 'They are not obliged to take the risk of prosecution, fines, and imprisonment and loss of property in order to secure an adjudication of their rights'" (Exhibit B, page 9).

"Declaratory Judgments."

(Edwin Borchard.)

"In these typical cases, no wrong or even hostile activity has been committed or threatened—a condition, it may be observed, which justified judicial relief in various equitable actions long before declaratory actions and judgments were eo nomine specifically authorized. What is visible in this type of case is the existence of an opposing claim which disturbs the peace and freedom of the plaintiff and, by raising doubt, insecurity, and uncertainty in his legal relations, impairs or jeopardizes his pecuniary or other interests. Jurisdictions authorizing the procedure for a declaratory judgment recognize that these interests are sufficiently important to warrant legal and judicial protection; those not authorizing the procedure have apparently not yet become aware either of the interest in question or of the social need of protecting them. A survey of some of the cases that have been decided under this procedure discloses it as an essential means of bringing to judicial cognizance many important legal issues

and of settling legal controversies promptly and efficiently before violence or hostile action has caused irreparable injury" (Exhibit C, page 2).

"Perhaps the principal contribution that the declaratory judgment has made to the philosophy of procedure is to make it clear that a controversy as to legal rights is as fully determinable before as it is after one or the other party has acted on his own view of his rights and perhaps irretrievably shattered the status quo. Such violence and destruction make the issue more painful and socially undesirable, but they do not make it any more controversial. The controversy was ripe for decision before the violence and destruction had begun. Once this fact becomes clear, the value of the declaratory judgment will be even more generally recognized. For, as Congressman Gilbert remarked in the debate on the first federal declaratory judgments bill,

> 'Under the present law you take a step in the dark and then turn on the light to see if you stepped in a hole. Under the declaratory judgment law you turn on the light and then take the step' " (Exhibit C, page 6)*.

III.

The Procedure Suggested by the Circuit Court Would Defeat the Purposes of the Declaratory Judgment Act.

After declaring that this cause should be dismissed, the Circuit Court recommended that the railroads negotiate an agreement with the bargaining agent, stating that if

> "any of the members have a just ground of complaint that the collective agreement is not binding on them for want of authority of the bargaining agent",

they can "obtain relief from it" the same "as Steele and Tunstall did"** [R. 359; 159 F. 2d 827].

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* Also quoted with approval in Senate Report No. 1005, Exhibit B, page 5.

** *Steele* v. *L. & N. R. Co.*, 323 U. S. 192.
Tunstall v. *Brotherhood*, 323 U. S. 210.

In support of these conclusions, the Circuit Court quoted the following paragraph from the opinion of this Court in the *Steele case*:

> " 'The representative which thus discriminates may be enjoined from so doing, and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making" [R. 359; 159 F. 2d 827-828].

Instead of entering the declaratory judgment sought by petitioners, which would have terminated this litigation, the Circuit Court would have the railroads and the bargaining agent make an agreement and then find out, in an injunction and damage suit, whether or not the agreement should have been made. This recommended procedure is precisely what the Declaratory Judgment Act was designed to prevent. It was what Representative Gilbert had in mind when he declared:

> "Under the present law you take a step in the dark and then turn on the light to see if you stepped in a hole. Under the declaratory judgment law you turn on the light and then take the step" (Senate Report No. 1005, Exhibit B, page 5; "Declaratory Judgments" by Edwin Borchard, Exhibit C, page 6).

Petitioners pray that this Court will "turn on the light" by entering a declaratory judgment so that neither they, nor their employees, nor the bargaining agent will step "in a hole" in the dark.

The Circuit Court said, in effect, that *if* the collective agreement which results from the negotiations is not binding on the employee defendants "for want of authority of the bargaining agent", then "it will not be binding on them or on the carriers"; but *if* the bargaining agent has the necessary authority, "the agreement will be binding"

on the employee defendants [R. 359; 159 F. 2d 827-828]. The Circuit Court did not seem to realize that there would be no *"ifs"* and that this litigation would be terminated by a judgment, instead of *obiter dicta,* in which it were declared that:

> "The carriers are under a statutory duty to negotiate with the Brotherhood. Neither negotiation nor an agreement with them therefore can make the carriers liable" [R. 359; 159 F. 2d 827].

After all of this, the Circuit Court concluded by way of *obiter dicta* that:

> "In either event, plaintiffs-carriers will be protected. In neither event will they have anything to fear" [R. 360; 159 F. 2d 828].

Petitioners wish they were as certain about this as the Circuit Court. But they have read the *Steele* and *Tunstall cases,* wherein damage suits against the Louisville & Nashville Railroad Company and the Norfolk & Southern Railway Company have been approved, and those decisions have not allayed their fears.

We fully agree with the apparent reasoning of the Circuit Court that the railroads, if required by law to deal with the bargaining agent, ought not to be answerable in damages to employees injured by such dealing even though the officers of the union are proceeding in violation of its constitution and by-laws. But the way to make certain of this is not through *obiter dicta* but by declaring the principle in a judgment, binding on everyone, wherein it is made plain that the employees' cause of action, if any, is solely against the bargaining agent and its officers who violate the union's constitution and by-laws.

IV.

The Interpretation Placed Upon the Declaratory Judgment Act by the Circuit Court of Appeals for the Fifth Circuit in This Case Is Contrary to and in Conflict With the Interpretations Placed Upon the Act by the Emergency Court of Appeals and by the Circuit Courts of Appeal for the Third, Fourth, Sixth and Seventh Circuits.

The refusal of the Circut Court of Appeals for the Fifth Circuit to enter a declaratory judgment in this case, and its direction that petitioners and the bargaining agent endeavor to negotiate an agreement, subject to a subsequent injunction and damage suit by twenty-nine employee defendants, is in conflict with the interpretations placed upon the Declaratory Judgment Act by the Emergency Court of Appeals and by the Circuit Courts of Appeal for the Third, Fourth, Sixth and Seventh Circuits, viz:

EMERGENCY COURT.

> "Under that [Declaratory Judgment] Act, if there is a reasonable dispute between the parties as to application and interpretation of an act of Congress or administrative order, either party has a right to resort to the District Court in an application for declaratory judgment," *Gordon* v. *Bowles,* 153 F. 2d 614, 616.

THIRD CIRCUIT.

> "In providing the remedy of a declaratory judgment it was the Congressional intent 'to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued.' *E. Edelman & Co.* v. *Triple-A Specialty Co.,* 7 Cir., 1937, 88 F. 2d 852, 854. This Court has emphasized that the Act should have a lib-

eral interpretation, bearing in mind its remedial character and the legislative purpose. *Alfred Hofmann, Inc.* v. *Knitting Machines Corp.*, 3 Cir., 1941, 123 F. 2d 458, 460; *Treemond Co.* v. *Schering Corp., supra,* 122 F. 2d at page 703," *Dewey & Alma Chemical Co.* v. *American Anode,* 137 F. 2d 68, 69-70; certiorari denied, 320 U. S. 761.

FOURTH CIRCUIT.

"The statute providing for declaratory judgments meets a real need and should be liberally construed to accomplish the purpose intended, *i.e.*, to afford a speedy and inexpensive method of adjudicating legal disputes without invoking the coercive remedies of the old procedure, and to settle legal rights and remove uncertainty and insecurity from legal relationships without awaiting a violation of the rights or a disturbance of the relationships," *Aetna Casualty & Surety Co.* v. *Quarles,* 92 F. 2d 321, 325.

SIXTH CIRCUIT.

"The conclusion of the District Court that the bill must be dismissed because the Declaratory Judgment Act comprehends situations only where the plaintiff seeks to establish a right and not those wherein he seeks to escape liability, is founded upon a misconception both of its terms and purpose. Even were it possible to conceive that immunity from threatened liability is not a right, the statute, by its terms, empowers the court to declare not only rights, but 'other legal relations' of any interested party petitioning for the declaration, and as was also noted in the Cold Metal Process case, *supra,* its purpose is to provide a remedy to the challenger of a right, who otherwise could not have his challenge adjudicated until his adversary took the initiative," *Employers' Liability Assur. Corporation* v. *Ryan,* 109 F. 2d 690, 691.

"Diversity of citizenship existing between the appellant and its insured, and the jurisdictional amount being involved in the controversy, the appellant had a

right under the Act to seek declaratory relief. This right could not in any way be affected by what thereafter transpired in the state court. Moreover, the question of the appeliant's liability under its agreement, could fully and completely be decided upon the issue presented by its bill, avoiding a multiplicity of suits, or defenses," *Maryland Casualty Co.* v. *Faulkner*, 126 F. 2d 175, 178.

SEVENTH CIRCUIT.

"The Declaratory Judgment Act merely introduced additional remedies. It modified the law only as to procedure and, though the right to such relief has been in some cases inherent, the statute extended greatly the situations under which such relief may be claimed. It was the congressional intent to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued," *E. Edelman & Co.* v. *Triple-A Specialty Co.*, 88 F. 2d 852, 854; certiorari denied, 300 U. S. 680.

See also *Davis* v. *American Foundry Equipment Co.*, 94 F. 2d 441, 442, and *Milwaukee Gas Specialty Co.* v. *Mercoid Corp.*, 104 F. 2d 589, 591-592.

Prayer.

Wherefore, petitioners pray that the Court will review and grant their petition for a writ of certiorari; that upon hearing of this cause the Court will enter a judgment declaring the obligations, duties, rights and other legal relations of the parties; that should the Court be of the opinion, as was the Circuit Court, that petitioners are required by law to negotiate with the bargaining agent even though its officers are proceeding in violation of its constitution and by-laws, that the Court in its judgment declare that

petitioners will not be answerable in damages to their employees injured by such negotiation, or by the agreement resulting therefrom, and that said employees' cause of action, if any, is solely against the bargaining agent and its officers who violate the union's constitution and by-laws; and for all other and further relief to which petitioners may be entitled.

Dated November 6, 1947.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I, M. E. CLINTON, of counsel for petitioners, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that I, on this date, have mailed a copy of this petition to Mr. Kemble K. Kennedy and to Mr. Fred G. Benton, counsel for all of the other parties to this cause.

Dated November 6, 1947.

M. E. CLINTON,
Of Counsel.

Exhibits.

Exhibits.

EXHIBIT A.

73d CONGRESS
2nd Session

HOUSE OF REPRESENTATIVES
REPORT No. 1264

AMEND THE JUDICIAL CODE

April 17, 1934.—Referred to the House Calendar and ordered to be printed

MR. MONTAGUE, from the Committee on the Judiciary, submitted the following

REPORT

(To accompany H. R. 4337)

The Committee on the Judiciary, to which was referred H. R. 4337, having considered the same, orders it to be favorably reported with the recommendation that the bill do pass.

The bill is as follows:

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That the Judicial Code, approved March 3, 1911, is hereby amended by adding after section 274C thereof a new section to be numbered 274D, as follows:

"Sec. 274D. (1) In cases of actual controversy the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed,

and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

"(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

"(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury such issues may be submitted to a jury in the form of interrogatories, with proper instruction by the court, whether a general verdict be required or not."

The bill fairly discloses its purpose and scope. It extends the judicial power for the rendition of what is known as "declaratory judgments," a procedure which has been substantially adopted in some form by 27 of the American States, by Great Britain for nearly 40 years, by Scotland for nearly 400 years, by several European nations, and by India, Australia and Canada, and wherever adopted it has given pronounced satisfaction in that it has accomplished most wholesome simplification and expedition in the administration of justice. Indeed, the delay in the exercise of this power and procedure by all of the States and by the Federal Government is difficult to appreciate.

The principle involved in this form of procedure is to confer upon the courts the power to exercise in some instances preventive relief; a function now performed rather clumsily by our equitable proceedings and inadequately by the law courts.

A most simple and striking definition of the procedure is thus made by Professor Borchard, of the Yale University School of Law. He writes:

The declaratory judgment, it will be recalled, enables parties who are uncertain of their legal rights,

and are pecuniarily or otherwise prejudiced by actual or potential adverse claims by others, to invoke the aid of the courts for the determination of their rights before any injury has been done.

Therefore, this form of preventive relief is distinguishable from curative relief in that the latter is incapable of redress until an injury has occurred or the contract broken.

The bill under consideration does not exhaust the principles involved in support of "declaratory judgments," but is a modified effort to secure relief by such procedure. The first section confines relief to actual, not potential, controversies; and the procedure may be invoked whether or not further consequential relief should be had, though a declaratory judgment has the force and effect of a final judgment or decree. Again, large discretion is conferred upon the courts as to whether or not they will administer justice by this procedure.

The "declaratory judgment" is a useful procedure in determining jural rights, obligations, and privileges, but may be applied to the ascertainment of almost any determinative fact or law. The declaration of a status was perhaps the earliest exercise of this procedure, such as the legality of marriage, the construction of written instruments, and the validity of statutes. It is intended to save tedious and costly litigation by ascertaining at the outset the controlling fact or law involved, thus either concluding the litigation or thereafter confining it within more precise limitations. If the meaning of a contract is controverted, for example, it may be needless to break it in order to obtain authoritative construction of the instrument, thus saving time and cost. These and other instances, together with the successful experience of the States which have used the procedure, make it most desirable that this legislation should be enacted.

In accordance with the rule there is printed below a copy of the law, showing in italics the new language.

Sec. 274A. In case any United States court shall find that a suit at law should have been brought in

equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form. (Title 28, sec. 397, U. S. C.)

Sec. 274B. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the record as law and justice shall require. (Title 28, sec. 398, U. S. C.)

Sec. 274C. Where, in any suit brought in or removed from any State court to any district of the United States, the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceeding and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as

though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal. (Title 28, sec. 399, U. S. C.)

Sec. 274D. (1) In cases of actual controversy the courts of the United States shall have power, upon petition, declaration, complaint, or other appropriate pleadings, to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court whether a general verdict be required or not.

EXHIBIT B.

CALENDAR No. 1067
73d CONGRESS
2nd Session

SENATE

REPORT No. 1005
DECLARATORY JUDGMENTS

May 10 (calendar day, May 14), 1934.—Ordered to be printed

MR. KING, from the Committee on the Judiciary, submitted the following

REPORT
(To accompany S. 588)

The Committee on the Judiciary, to whom was referred the bill (S. 588) to amend the Judicial Code by adding a new section, to be numbered 274D, having considered the same, report favorably thereon and recommend that the bill do pass with the following amendments:

On page 1, line 7, after the word "which" and before the word "the" add the words "at any time."

On page 2 strike out lines 17, 18, 19, and 20.

For a number of years measures providing for declaratory judgments have been before the House and the Senate.

On Friday, April 27, 1928, a subcommittee of the Judiciary Committee of the Senate held hearings on H. R. 5623 (70th Cong. 1st sess.) to amend the Judicial Code by adding a new section (274D) to authorize the Federal courts to

render declaratory judgments. This measure was with but a few verbal changes, the same as S. 588.

There appeared before the subcommittee as witnesses: Mr. Henry W. Taft, chairman of the committee on jurisprudence and law reform of the American Bar Association who appeared on behalf of the bill as representative of the American Bar Association; Mr. George E. Beers, of New Haven; Judge Jesse Miller, of Minnesota; Prof. Edwin M. Borchard, of the Yale Law School; and Prof. Edson R. Sunderland, of the Michigan Law School. All of these gentlemen, several of whom have studied the declaratory judgment procedure exhaustively, and have had practical experience with it, strongly approved the bill as constituting a valuable and effective aid in the administration of justice. There were also submitted to the subcommittee letters from Chief Judge Cardozo of the Court of Appeals of New York; Chief Justice von Moschzisker of the Supreme Court of Pennsylvania, and Judge Thomas W. Swan of the circuit court of appeals for the second circuit, all of whom approved the declaratory judgment procedure as a result of their practical experience. The testimony of the witnesses and the letters from the above-mentioned judges will be found printed in the hearings of the subcommittee. In those hearings will also be found an extended list of typical cases, in which the declaratory judgment has been invoked, prepared by Professor Borchard of Yale. His memorandum presents a survey of the practical operation of the procedure in the jurisdictions where it is now available.

NATURE OF THE DECLARATORY JUDGMENT.

The declaratory judgment differs in no essential respect from any other judgment except that it is not followed by a decree for damages, injunction, specific performance, or other immediately coercive decree. It declares conclusively and finally the rights of parties in litigations over a contested issue, a form of relief which often suffices to settle controversies and fully administer justice. It en-

ables parties in disputes over their rights over a contract, deed, lease, will, or any other written instrument to sue for a declaration of rights, without breach of the contract, etc., citing as defendants those who oppose their claims of right. It has been employed in State courts mainly for the construction of instruments of all kinds, for the determination of status in marital or domestic relations, for the determination of contested rights of property, real or personal, and for the declaration of rights contested under a statute or municipal ordinance, where it was not possible or necessary to obtain an injunction.

In the case of *Newsum* v. *Interstate Realty Co.* (152 Tenn. 302, 278 S. W. 56, 1925), the court stated:

> A declaratory judgment is essentially one of construction. It is apparent from the history of the legislation providing for this procedure, as well as from the recital of the Uniform Declaratory Judgments Act, that its primal purpose is the construction of definitely stated rights, status, and other legal relations, commonly expressed in written instruments, although not confined thereto.

The limitations and condition upon the rendering of such judgment are well stated in the case of *Braman* v. *Babcock* (98 Conn. 549, 120 Atl. 150, 1923), in which it was held that the Connecticut act, which closely resembles the proposed Federal act, authorizes—

> the superior court to render final judgments as to the existence or nonexistence of any right, power, privilege, or immunity, or of any facts upon which the existence or nonexistence of such right, power, privilege, or immunity may depend * * *. The party seeking such a judgment must have an interest, legal or equitable, by reason of danger of loss or of uncertainty as to his rights or other jural relations, and that there must be an actual bona fide and substantial question or issue in dispute, or substantial uncertainty of legal relations which require settlement between the parties; that all parties having an interest in the

> * * * complaint are parties to the proceeding, or have reasonable notice; and that the courts be of the opinion that the parties should not be left to seek redress in some other form of procedure, that issues of fact may be submitted to the jury, and that the decision of the court shall be final and subject to review by appeal.

The procedure has been especially useful in avoiding the necessity, now so often present, of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages. So now it is often necessary, in the absence of the declaratory judgment procedure, to violate a statute in order to obtain a judicial determination of its meaning or validity. Compare *Shredded Wheat Co.* v. *City of Elgin* (284 Ill. 389, 120 N. E. 248, 1918), where the parties were denied an injunction against the enforcement of a municipal ordinance carrying a penalty, and were advised to purport to violate the statute and then their rights could be determined, with *Erwin Billiard Parlor* v. *Buckner* (156 Tenn. 278, 300 S. W. 565, 1927), where a declaratory judgment under such circumstances was issued and settled the controversy. So now it is often necessary to break a contract or a lease, or act upon one's own interpretation of his rights when disputed, in order to present to the court a justifiable controversy. In jurisdictions having the declaratory judgment procedure, it is not necessary to bring about such social and economic waste and destruction in order to obtain a determination of one's rights. There was filed with the committee and printed in the hearings a number of annotations from Carmody's New York practice act, in which the compiler undertook to compare the relief obtainable under the declaratory judgment procedure, without the necessity of prior breach, with the old practice of having first to break contracts or act on one's own interpretation in order to obtain a judicial determination. The comparison is enlightening. There seems little question that in many situations in the conduct of business serious disputes occur between parties,

where, if there were a possibility of obtaining a judicial declaration of rights in a formal action, much economic waste could be avoided and social peace promoted. Persons now often have to act at their peril, a danger which could be frequently avoided by the ability to sue for a declaratory judgment as to their rights or duties.

The fact is that the declaratory judgment has often proved so necessary that it has been employed under other names for years, and that in many cases the injunction procedure is abused in order to render what is in effect a declaratory judgment. For example, in the case of *Pierce* v. *Society of Sisters* (268 U. S. 510, 525, 45 Sup. Ct. 571, 1925), the court issued an injunction against the enforcement of an Oregon statute which was not to come into force until 2 years later; in rendering a judgment declaring the statute void, the court in effect issued a declaratory judgment by what was, in effect, apparently, an abuse of the injunction. See also *Village of Euclid* v. *Ambler Realty Co.* (272 U. S. 365, 47 Sup. Ct. 114, 1926). Much of the hostility to the extensive use of the injunction power by the Federal courts will be obviated by enabling the courts to render declaratory judgments.

An important practical advantage of the declaratory judgment lies in the fact that it enables litigants to narrow the issue, speed the decision, and settle the controversy before an accumulation of differences and hostility has engendered a wide and general conflict, involving numerous collateral issues. Some of the illustrations in Carmody's Annotations are in this respect enlightening.

Representative Ralph Gilbert in discussing this bill in the House of Representatives on January 25, 1928, described the declaratory judgment procedure as follows:

> You have the same court, the same jurisdiction, the same procedure, the same parties and the same question. Under the present law you take a step in the dark and then turn on the light to see if you have stepped into a hole. Under the declaratory judgment law you turn on the light and then take the step.

The report of the American Bar Association committee on noteworthy changes in the statute law, in September 1919, states:

> No more important statutes dealing with the administration of justice have been passed in recent years than those authorizing the courts to enter declaratory judgments determining rights and duties.

HISTORY.

The declaratory judgment has existed in Scotland for over 400 years, and in England since 1852. It is in force in Canada, in practically all the British dominions and colonies, in several of the countries of Latin America, and in Germany, Austria, and other continental countries. For us, the English practice is necessarily of greatest interest. In 1883 a rule of the Supreme Court of Judicature was adopted under which the declaratory judgment procedure in its present form was introduced. A simple rule of court sufficed to establish it in England. It is estimated that some 2,000 cases have been presented to the highest courts since 1883, and we are informed that the majority of the equity cases now coming up in England are proceedings for declaratory judgments. Order XXV, rule 5, of the Supreme Court Rules of 1883, reads:

> No action or proceeding shall be open to objection on the ground that a merely declaratory judgment is sought thereby, and the court may make binding declarations of rights whether any consequential relief is or could be claimed, or not.

That rule furnishes the basis of S. 588 which provides that in cases within the jurisdiction of the Federal courts, those courts—

> shall have power to declare rights and other legal relations on request of any interested party for such declaration whether or not further relief is or could be prayed, and such declaration shall have the force of final decree and be reviewable as such.

Since 1919, 34 States and Territories of the Union have enacted the declaratory judgment statute. The movement for the adoption of these statutes has been particularly active since the adoption in 1921 by the commissioners on Uniform State Laws of the Uniform Declaratory Judgments Act. The States and Territories that now have such statutes are: Arizona, California, Colorado, Connecticut, Florida, Hawaii (Territory), Idaho, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Philippines (Territory), Puerto Rico (Territory), Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Wisconsin and Wyoming.

Some 1,200 cases have arisen under these statutes, including 200 each reported in New York and Pennsylvania, covering almost every department of human activity. The statutes appear to have met with favor from the courts, and the subcommittee is impressed with the laudatory comments of lawyers and judges who have had actual experience with this procedure.

The fact is that the declaratory judgment in a limited form has been known to the common law, or under statute, for many years. The equitable actions for the removal of clouds from title, the action by a person in possession for the statutory period against a person claiming under a record title to have the latter's title declared void, actions impressing a trust on the legal title, actions to declare written instruments null, actions to construe wills, statutes authorizing judgments proving the tenor of lost instruments or proving the validity, when contested, of instruments to be recorded, and other illustrations that will readily occur to the lawyer are all cases in which declaratory judgments are rendered under other names. The decisions of the United States Court of Claims are essentially declaratory in nature, for they provide for no execution. The proposed section 274D would simply extend declaratory relief to other cases, provided the parties and subject matter are within the jurisdiction of the Federal

courts, in the same way that such relief has been extended in England and in the 34 States and Territories that now have such statutes in the United States. In principle, therefore, there is nothing novel about the procedure.

CONSTITUTIONALITY.

For some time doubts prevailed in certain courts, which assumed that the declaratory judgment had an analogy to advisory opinions. This confusion has now been dissipated. The declaratory judgment is a final, binding judgment between adversary parties and conclusively determines their rights. The Federal bill specifically provides for declaratory adjudication only "in cases of actual controversy." That precludes hypothetical, academic, or moot cases. The words "in cases of actual controversy" are designed to make certain what would be obvious even without them. The court has a discretion, now hardened into rule, not to issue the judgment if it will not finally settle the rights of the parties. The question of constitutionality has now been unanimously decided in 20 courts of the United States, Michigan having reversed its earlier opinion in which it was assumed that a declaratory judgment was an advisory opinion.

The United States Supreme Court, after some hesitation in dicta, finally had squarely to pass upon the matter and, in an exhaustive opinion, upheld the declaratory judgment as of the very essence of judicial power. In *Nashville, Chattanooga & St. Louis Ry. v. Wallace* (288 U. S. 249, 264, 53 Sup. Ct. 345, 1933), the Supreme Court has said:

> Hence, changes merely in the form or method of procedure by which Federal rights are brought to final adjudication in the State courts are not enough to preclude review of the adjudication by this Court, so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy, which is finally determined by the judgment below. (See *Old Colony Trust Co. v. Commissioner*, 279 U. S. 716, 724.) As the prayer for relief by in-

junction is not a necessary prerequisite to the exercise of judicial power, allegations of threatened irreparable injury which are material only if an injunction is asked, may likewise be dispensed with if, in other respects, the controversy presented is, as in this case, real and substantial.

The bill in its present form is a refinement as a result of years of consideration. The bill has passed the House of Representatives in four separate Congresses. Originally the bill had a fourth section providing that "the Supreme Court may adopt rules and regulations for carrying out the provisions of this act." Actually, however, there is no necessity for rules, for there is no material change in existing procedure, except that the prayer for relief in a petition or bill could under the proposed act request a declaration of rights, instead of or in addition to coercive relief in the form of damages, injunctions, specific performance, mandamus, etc. Some of the State statutes provide for court rules, partly because the courts in those States have rule-making power and partly because it was desired to make clear what could and could not be done under the action for declaratory judgments. For the most part these rules were a codification of existing decisions of the courts in England and the United States. The uniform act contains 16 sections, partly because many States do not accord their courts the rule-making power. There seems no need for such an extensive Federal bill; and while the procedure is neither distinctly in law nor in equity, but sui generis, the Supreme Court could probably at any time make rules under its equity power, if it saw fit.

Finally, it may be said that the declaratory-judgment procedure has been molded and settled by thousands of precedents, so that the administration of the law has been definitely clarified. The Supreme Court mentioned one of its principal purposes in *Terrace v. Thompson,* (263 U. S. 197, 216, 44 Sup. Ct. 15, 1923), by Butler, J., when it said:

> They are not obliged to take the risk of prosecution, fines, and imprisonment and loss of property in order to secure an adjudication of their rights.

Exhibit B.

The 1,200 American decisions have established that the proceeding must be adversary, all interested parties must be cited, the issue must be real, the question practical and not academic, and the decision must finally settle and determine the controversy. It enables disputes arising out of written instruments, or otherwise, to be adjudicated without requiring a destruction of the status quo and of the social and economic fabric. Experience has shown that a dispute can be adjudicated as effectively, if not more usefully, before the status quo has been destroyed.

The long history of the procedure in England, and for some 15 years in the United States, encourages the committee to believe that the new section of the Judicial Code will be an important aid in the administration of justice.

EXHIBIT C.

EXTRACTS FROM "DECLARATORY JUDGMENTS" BY EDWIN BORCHARD, HOTCHKISS, PROFESSOR OF LAW, YALE UNIVERSITY; CO-DRAFTSMAN OF THE DECLARATORY JUDGMENT ACT (CONGRESSIONAL RECORD, PAGE 2027, 70TH CONGRESS, 1ST SESSION).

"The fact, however, that no coercive decree is sought or is attached to the judgment enables actions to be brought for a declaratory judgment on two different types of operative facts: (a) those which might also have justified an action for an executory (coercive) judgment or decree, or (b) those which are not susceptible of any other relief.

"It is this latter class of cases which in the main has caused occasional difficulty in the courts and which at the same time exemplifies some of the striking economic and social advantages of the procedure directed to a declaratory judgment. Whereas in the former class of cases—where an action for execution might have lain—the action for a judicial declaration is an alternative remedy, in the latter class it is an exclusive remedy. The distinctive features of this second group is that no 'injury' or 'wrong' need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty, by denial, by the existence of a potentially injurious instrument, by some unforeseen event or catastrophe the effect of which gives rise to dispute, or by the assertion of a conflicting claim by the defendant, e.g., that the plaintiff claims she is the defendant's wife, which defendant denies; that the defendant public official demands certain tax information, from the exaction of which plaintiff claims immunity; that defendant lessee demands the erection of a three-story fireproof building under a lease (the old non-fireproof one having burned), whereas plaintiff lessor maintains he is privi-

leged to erect a two-story building, the new statutory limit for garages; that a state statute requires a heavy license fee from billiard parlors in one county only, whereas plaintiff asserts his immunity therefrom on the ground of unconstitutionality; that plaintiff is not under a duty to return to defendant certain moneys paid by defendant on forged bills of lading; that defendant asserts plaintiff is bound to perform a contract for a future period, whereas plaintiff maintains he is not so bound; that plaintiff claims in 1915 that he is no longer bound to perform certain long-term contracts to deliver iron ore to the defendant from 1911 to 1919, on the ground that the war has abrogated the contracts; that the plaintiff debtor is privileged to repay the defendant creditor in Russian rubles instead of British pounds and thereupon recover the pledged security; that certain buildings are 'temporary', within the meaning of a statute, and that plaintiff public officials are privileged to tear them down as such.

"In these typical cases, no wrong or even hostile activity has been committed or threatened—a condition, it may be observed, which justified judicial relief in various equitable actions long before declaratory actions and judgments were eo nomine specifically authorized. What is visible in this type of case is the existence of an opposing claim which disturbs the peace and freedom of the plaintiff and, by raising doubt, insecurity, and uncertainty in his legal relations, impairs or jeopardizes his pecuniary or other interests. Jurisdictions authorizing the procedure for a declaratory judgment recognize that these interests are sufficiently important to warrant legal and judicial protection; those not authorizing the procedure have apparently not yet become aware either of the interest in question or of the social need of protecting them. A survey of some of the cases that have been decided under this procedure discloses it as an essential means of bringing to judicial cognizance many important legal issues and of settling legal controversies promptly and efficiently before violence or hostile action has caused irreparable injury. This is especially true in the matter of long-term contracts, the execution of which is affected by all sorts of new legislation

and events incidental to a period of rapid change. It should be unnecessary for either party to breach the contract or act on his own interpretation of its meaning or of the effect of new events, and incur the risk of breach, forfeiture, and damages, as a prerequisite to bringing the contract to judicial cognizance for construction and interpretation. The dispute having arisen, either party, before and without breach, should be able to summon the other party to court and obtain judgment. Acting at one's peril to break the deadlock should become less necessary as time goes on. Most civilized jurisdictions recognize this interest in security and certainty and afford it judicial protection on evidence of dispute or contest, if a useful purpose is thereby served. Some have not yet appreciated its importance. But thousands of cases in nearly every country of Europe, America, and Asia attest the social value of construing and interpreting written instruments and determining and settling legal relations of all kinds on proof of controversy or dispute, in the realization that social waste and disturbance are thereby avoided and private and public security promoted." (pages 24-26).

* * * * *

"*Justiciability.* Justiciability is the necessary condition of judicial relief. It is that which the term 'case' or 'controversy' is designed to insure, and the Supreme Court has had frequent occasion to consider the matter. So have the courts of foreign countries. What, then, are the 'necessary features' of justiciability? While state courts occasionally assume legislative and executive functions which could not be imposed on federal courts, the power to determine contested rights is a traditional function of all judicial courts in the western world. Expediency and the relative danger of conflict with other departments of the government have induced a refusal to decide major political questions or review mere administrative findings. Expediency and a desire not to function in the abstract, but to decide only concrete contested issues conclusively affecting adversary parties in interest, have induced a refusal to render advisory opinions or decide moot cases. Actions or opinions are denominated 'advisory', when there is an insufficient

interest in the plaintiff or defendant to justify judicial determination, where the judgment sought would not constitute specific relief to a litigant or affect legal relations or where, by reason of inadequacy of parties defendant, the judgment could not be sufficiently conclusive. Actions or opinions are described as 'moot' when they are or have become fictitious, colorable, hypothetical, academic, or dead. The distinguishing characteristics of such issues is that they involve no actual, genuine, live controversy, the decision of which can definitely affect existing legal relations. The issue is either not yet ripe for determination, because no opposing claim or right has yet been asserted or advanced or has arisen and hence no actual or potential conflict can be established, or else the issue has ceased to be live or practical, because the facts have changed, either by settlement of the controversy or by alteration in the circumstances of the parties or subject-matter, so as to make the judgment not decisive or controlling of actual and contested rights, but a pronouncement having academic interest only. Such issues cannot be determined by declaratory judgment any more than by another judgment.

" 'The fact that the plaintiff's desires are thwarted by its own doubts, or by the fears of others', may or may not describe a hypothetical or moot case, depending on the circumstances. In bills of peace, quia timet, to quiet title, of interpleader, and other equitable proceedings, in actions to declare transactions (such as marriages) or instruments (such as bonds or deeds or titles) or privileges and powers (such as sale) valid or void, the plaintiff's action may be motivated by his own doubts or the denial or fears of third parties as to his right or title, but there is no justiciable issue until he translates his doubt into a claim of right and asserts it against a defendant having an interest in contesting it. When that happens, it is a justiciable controversy, regardless of its origin in the plaintiff's own doubts or the fears of others, and regardless of the form of action, declaratory or executory, in which the issue is presented. The question is, whether the plaintiff has a sufficient interest to warrant judicial protection." (pages 29-32.)

* * * * *

"As already observed, such a criterion would make it apparent that a debtor has as much interest in denying the unfounded demand of his creditor as the creditor has in asserting his claim against the debtor. The defeat of an unfounded claim which disturbs or renders insecure a person's rights is as much an interest capable and in need of protection as the assertion of the claim itself. The assertion of the plaintiff's privilege or lack of duty, of his immunity or lack of liability, when demands are extrajudicially or judicially made upon him, are as much interests worthy of judicial protection as the claim of plaintiff's rights and powers or of defendant's duties and liabilities. The great advantage of the declaratory judgment is that it enables the point in dispute to be raised at the inception of the controversy, before damage has been done by acting upon one's own view of his rights, and that it enables the issue to be narrowed within the strictest limits." (page 39.)

* * * * *

"When are the facts contingent? That is not always easy to determine. The Pennsylvania Supreme Court in an exhaustive opinion which has been followed extensively, laid down the rule that the court must be

> 'satisfied that an actual controversy, or the ripening seeds of one, exists between parties, all of whom are sui juris and before the court, and that the declaration sought will be a practical help in ending the controversy.'

"By 'ripening seeds' the court meant, not that sufficient accrued facts may be dispensed with, but that a dispute may be tried at its inception before it has accumulated the asperity, distemper, animosity, passion, and violence of the full-blown battle which looms ahead. It describes a state of facts indicating 'imminent' and 'inevitable' litigation. The dispute may by declaration be determined before the status quo has been altered by physical acts of either party.

"And yet, distinctions are here important. When a tenant contends that he is privileged to tear down a leased building and the landlord denies that privilege, material interests being at stake, the controversy is real and actual, and not hypothetical, though the building has not yet been

touched. When two persons in interest dispute as to their right to property, to public office, to a right of way, to a personal status, to a lien, to a privilege to act under an existing instrument or law, to immunity from adverse claims, the controversy is actual and fully matured, although no violence or trespass has yet been committed by either party. Such controversies are 'ripe' for decision, as soon as the court is convinced that the antagonism is genuine and that the court's judgment will conclusively determine the issues involved. Perhaps the principal contribution that the declaratory judgment has made to the philosophy of procedure is to make it clear that a controversy as to legal rights is as fully determinable before as it is after one or the other party has acted on his own view of his rights and perhaps irretrievably shattered the status quo. Such violence and destruction make the issue more painful and socially undesirable, but they do not make it any more controversial. The controversy was ripe for decision before the violence and destruction had begun. Once this fact becomes clear, the value of the declaratory judgment will be even more generally recognized. For, as Congressman Gilbert remarked in the debate on the first federal declaratory judgments bill,

> 'Under the present law you take a step in the dark and then turn on the light to see if you stepped in a hole. Under the declaratory judgment law you turn on the light and then take step'." (pages 41-42.)

* * * * *

"When a person shows that he is able and ready to perform a certain act, e.g., to pay off a mortgage or lien or pay it in a certain way, and the dispute turns on his privilege so to do, the issue is ripe for decision, although the payment has not yet been made. The imminence and practical certainty of the act or event in issue, or the intent, capacity, and power to perform, create justiciability as clearly as the completed act or event, and is generally easily distinguishable from remote, contingent, and uncertain events that may never happen and upon which it would be improper to pass as operative facts." (pages 43-44.)

* * * * *

"The defendant's acts must be sufficiently definite and final to constitute a genuine threat to the plaintiff's peace of mind or pecuniary interests. When that time has come is again not always easy to state. The enactment of a statute providing for the taxation of property deemed tax-exempt places an affected plaintiff in gear to claim immunity. So, a plaintiff contesting the applicability or validity of restrictive regulations under the police power need do no more than show that they in some way affect him deleteriously. But until the statute or ordinance is passed, the claim of privilege or immunity would be premature. Where the immunity is claimed against administrative action, rather than against a statute as such, there must be some evidence that the administrative action is threatened. Prior to that time, protest would usually be deemed premature. Plans for acts initiated by a defendant in a position to harm the plaintiff may, if deemed serious and inevitable, constitute a threat sufficient to start proceedings. In these cases, the court must merely be convinced that the plan is sufficiently ripe to justify the plaintiff's fears of injury and the court's interference by adjudication.

"In many cases a denial or challenge of the plaintiff's rights by a qualified person creates a legal interest in judicial relief. In other cases, a more definite threat of injury to the plaintiff may be necessary, for example, the assertion of a cloud on his right or title. If a cloud is not dissipated, it will reduce the value of the plaintiff's land or impair other privileges, wherefor allegation or proof of the existence of the cloud creates justiciability.

"The danger of a criminal penalty attached by law to the performance of an act affords those affected the necessary legal interest in a judgment raising the issue of validity, immunity, or status. The threat to enforce the statute seems hardly necessary, for public officials are presumed to do their duty. The plaintiff need only show that his position is jeopardized by the statute." (pages 45-47.)